

1 TRANSCRIBED FROM DIGITAL RECORDING

2 IN THE UNITED STATES DISTRICT COURT
3 NORTHERN DISTRICT OF ILLINOIS
4 EASTERN DIVISION

CLERK'S FILE COPY
0707-2072

4 UNITED STATES OF AMERICA,

5 Plaintiff,

6 vs.

7 DAVID ANTHONY DOWNING, DANIEL FRANCIS)

8 BERGER, AZAR BEREND NIEKAMP,

9 Defendants.

) No. 07 CR 318

) 07 CR 319

) 07 CR 320

) Chicago, Illinois

) May 19, 2007

) 4:15 P.M.

10 TRANSCRIPT OF PROCEEDINGS - Removal proceeding
11 BEFORE THE HONORABLE MARTIN C. ASHMAN, Magistrate Judge

12 APPEARANCES:

13 For the Government:

HON. PATRICK J. FITZGERALD

219 South Dearborn Street

Chicago, Illinois 60604

14 BY: MR. BENJAMIN F. LANGNER

15 For the Defendants:

THOMAS M. BREEN AND ASSOCIATES

53 West Jackson Boulevard

Suite 1460

Chicago, Illinois 60604

17 BY: MR. TODD S. PUGH

18 ALSO PRESENT:

Ms. Sara M. Nieling

Pretrial Service Officer

20 FILED

21 MAY 29 2008 RC

PAMELA S. WARREN, CSR, RPR

Official Court Reporter

219 South Dearborn Street

Room 1928

Chicago, Illinois 60604

(312) 294-8907

22 MICHAEL W. DOBBINS
23 CLERK, U.S. DISTRICT COURT

24 NOTE: Please notify of correct speaker identification.
25

1 (Proceedings held in open court:)

2 THE COURT: All right. United States versus Niekamp,
3 Downing, and Berger.

4 Would you please step up.

5 MR. LANGNER: Good afternoon, your Honor. Ben Langner
6 on behalf of the government.

7 MR. PUGH: Good afternoon, Judge Ashman. My name is
8 Todd Pugh, P-u-g-h, from Tom Breen's office.

9 Judge, I am representing David Downing and ask leave
10 to file my appearance on his behalf.

11 I have been asked as a courtesy, because there is
12 nobody here from the Federal Defender Program, to stand in for
13 the purpose of initial appearance for all of the individuals
14 charged. And if the Court doesn't have an objection to do
15 that, I will do that.

16 THE COURT: All right. We'll do that. You will be
17 appointed for today's purposes only.

18 Who is Mr. Niekamp? All right.

19 DEFENDANT NIEKAMP: (Unintelligible).

20 THE COURT: And Daniel Francis Berger?

21 DEFENDANT BERGER: (Unintelligible).

22 THE COURT: Downing?

23 DEFENDANT DOWNING: (Unintelligible).

24 THE COURT: All right. Now speaking to the three of
25 you, directly to the three of you, the purpose of the hearing

1 today is to inform you of the charge against you, inform you of
2 certain rights that you have which are important to you, and to
3 set and describe the circumstances and conditions of your
4 release from custody pending further court proceedings if it is
5 deemed appropriate. You will not be called upon to answer to
6 the charges today.

7 I want to advise you of the following: You are not
8 required to make any statements. If you have made a statement,
9 you need not say anymore. If you choose to make a statement,
10 you may stop at any time. And any statement made by you can be
11 used against you.

12 Now, Mr. Niekamp, do you understand what I have just
13 told you?

14 DEFENDANT NIEKAMP: (Unintelligible).

15 THE COURT: Mr. Berger, how about you, do you
16 understand what I have just told you?

17 DEFENDANT BERGER: Yes, your Honor.

18 THE COURT: And, Mr. Downing, do you understand what I
19 have just told you?

20 DEFENDANT DOWNING: (Unintelligible).

21 THE COURT: Now I also want to advise you that you
22 have a right to counsel and to confer with your counsel at
23 every critical stage of this criminal proceeding, including
24 this one.

25 If you have any questions of your counsel, I will

1 interrupt these proceedings to allow you to discuss these
2 questions.

3 If you are unable to afford an attorney, an attorney
4 will be appointed to represent you at no cost.

5 You also have the right to retain counsel of your own
6 choice. You also have the right to waive the assistance of
7 counsel and to represent yourself if you voluntarily and
8 intelligently elect to do so.

9 You have the right to consult with and be represented
10 by counsel during any questioning by the governmental
11 authorities.

12 Now, Mr. Niekamp, do you fully understand your rights
13 regarding counsel?

14 DEFENDANT NIEKAMP: Yes, your Honor.

15 THE COURT: Mr. Berger, how about you?

16 DEFENDANT BERGER: Yes, your Honor.

17 THE COURT: And Mr. Downing?

18 DEFENDANT DOWNING: Yes, your Honor.

19 THE COURT: All right. Have each of the defendants
20 received a copy of the complaint and supporting affidavit?

21 MR. PUGH: I have given a copy of the complaint. And
22 I have actually had an opportunity to go over the charges with
23 Mr. Downing last night, Judge.

24 So they have all -- they are all on notice as to what
25 the charges are, Judge.

1 THE COURT: All right. Would the assistant United
2 States Attorney please state the charge and the nature and
3 maximum possible penalty provided by law.

4 MR. LANGNER: Your Honor, the defendants are -- each
5 and together conspired -- I'm sorry -- charged with, in the
6 Northern District of Iowa, conspiring to willfully and
7 knowingly with intent to defraud the United States smuggle and
8 introduce into the United States merchandise which should have
9 been invoiced.

10 They are also charged with conspiring to import 100
11 kilograms or more of marijuana into the United States and with
12 conspiring to distribute and possess with intent to distribute
13 100 kilograms or more of marijuana. The maximum penalties
14 associated with the first of those charges -- I'm sorry,
15 the -- yeah, the first of those charges, specifically the
16 conspiracy to defraud the United States, are a term of
17 imprisonment of not more than five years and a fine of
18 \$250,000.

19 The maximum penalties associated with the charge of
20 conspiring to import into the United States 100 kilograms or
21 more of marijuana are a term of imprisonment of not less than
22 five years and not more than 40 years; and the charge of
23 conspiring to possess with intent to distribute and distribute
24 100 kilograms or more of marijuana are a term of imprisonment
25 of not less than five years and not more than 40 years, and a

1 fine of \$2 million -- excuse me -- the fine of \$2 million would
2 also apply to the second of those two charges.

3 THE COURT: Yes.

4 Now, Mr. Niekamp, do you understand the charge against
5 you?

6 DEFENDANT NIEKAMP: Yes, I do.

7 THE COURT: And do you understand the nature of the
8 penalty provided?

9 DEFENDANT NIEKAMP: Yes.

10 THE COURT: Mr. Berger, do you understand the charge
11 against you?

12 DEFENDANT BERGER: Yes, your Honor.

13 THE COURT: Do you understand the nature of the
14 penalty provided?

15 DEFENDANT BERGER: Yes, your Honor.

16 THE COURT: Mr. Downing, do you understand the charge
17 against you?

18 DEFENDANT DOWNING: Yes, your Honor.

19 THE COURT: And do you understand the nature of the
20 penalty provided?

21 DEFENDANT DOWNING: Yes, your Honor.

22 THE COURT: Now on a criminal complaint, on these
23 criminal complaints, you have the right to a preliminary
24 examination on this complaint. This is an evidentiary hearing
25 before a magistrate judge to determine whether there was

1 probable cause to hold you under this particular charge.

2 At this hearing the government must establish the
3 probability that a crime has been committed and that you are
4 indeed the person who committed it. At this hearing, you have
5 the right to cross examine all witnesses presented by the
6 government and to present witnesses on your own behalf if you
7 so choose. However, if an indictment is returned by the
8 federal grand jury before the date set for your preliminary
9 examination, this is considered a showing of probable cause and
10 the preliminary examination will be canceled.

11 Now this being a removal to the Northern District of
12 Iowa, before I can order your return to the Northern District
13 of Iowa, you have the right to what is called an identity
14 hearing. This is a hearing to establish that you are in fact
15 the person named in this charge.

16 Counselor, what is your pleasure with regard to that?

17 MR. PUGH: Judge, as to Mr. Downing, who is my client,
18 I would -- our position is going to be on that that Mr. Downing
19 is the person named within the complaint.

20 THE COURT: So you waive the identity hearing?

21 MR. PUGH: We would.

22 However, considering my relationship with the two
23 other persons, I don't think I can do that for them, Judge.

24 THE COURT: All right. Then we will have an identity
25 hearing on that.

1 MR. LANGNER: Your Honor --

2 THE COURT: Yes.

3 MR. LANGNER: -- Mr. Pugh and I had discussed this
4 ahead of time, and what we had discussed, and with your Honor's
5 permission, what we would like to do is to have a status
6 hearing on Monday when the two other individuals here could get
7 representation --

8 THE COURT: Right.

9 MR. LANGNER: -- and we could determine if identity
10 and detention and probable cause are going to be things that we
11 were going to do or whether they would be waived.

12 THE COURT: Okay. I want to advise each one of you of
13 the potential for having your case transferred to this district
14 for disposition. If you wish such a transfer, you must state
15 in writing that you wish to plead guilty or no contest and to
16 waive trial in the Northern District of Iowa and to consent to
17 disposition of this case here in the Northern District of
18 Illinois. Such a transfer is subject, however, to the approval
19 of the United States Attorneys for each district.

20 With regard to bail in general, you each have the
21 right to be admitted to bail on the least restrictive
22 conditions necessary to assure your return to the Court as
23 ordered and to protect the safety of others in the community.

24 And I take it now with regard to Mr. Downing also, you
25 want -- you're asking for a detention hearing?

1 MR. PUGH: We will.

2 THE COURT: Or you're asking for a status?

3 MR. PUGH: We would. We would join in that status on
4 Monday, Judge.

5 THE COURT: All right. We will set a status on
6 detention hearing, identity hearing, and preliminary
7 examination for Monday, May 21, at --

8 MR. PUGH: Judge, just if we could weigh in on it at
9 all, we were --

10 THE COURT: Pardon?

11 MR. PUGH: If we could weigh in on the decision at
12 all, we were both looking for something in the late afternoon
13 if it comports with your schedule.

14 THE COURT: That sounds -- that sounds good.

15 3:30.

16 MR. PUGH: Beautiful.

17 MS. NIELING: Your Honor, Sarah Nieling, pretrial
18 services. I just wanted to find out, do you want written
19 pretrial reports for the status hearing on Monday or shall we
20 wait and see what happens?

21 THE COURT: Well, if you can do them by the status
22 hearing, that would be good. That helps people make a decision
23 as to whether they are going to have a detention hearing or
24 not.

25 MS. NIELING: (Unintelligible) I'm writing all three

1 of them so --

2 THE COURT: Pardon?

3 MS. NIELING: I'm writing all three of them, so I'll
4 do my best (unintelligible) --

5 THE COURT: Okay.

6 MS. NIELING: -- by Monday.

7 THE COURT: All right. So all three matters are put
8 on for Monday, May 21 at 3:30.

9 MR. LANGNER: Thank you, your Honor.

10 MR. PUGH: Thank you, your Honor. Have a good day.

11 THE COURT: All right. We'll see you then.

12 (Brief interruption.)

13 MR. LANGNER: Your Honor, Ms. Nieling has one more
14 interview to do. Can she do that in the courtroom or are you
15 going to lock up the courtroom?

16 THE COURT: Sure.

17 MR. LANGNER: Okay.

18 THE COURT: Well, I am going to lock the courtroom. I
19 do want to lock the courtroom.

20 MR. LANGNER: Okay.

21 THE COURT: So take --

22 MR. LANGNER: We can --

23 THE COURT:B -- him in another room.

24 MS. NIELING: -- go to the lobby out on 13 if you
25 would prefer.

1 THE COURT: Yeah.

2 MR. LANGNER: Okay.

3 (Which concluded the proceedings in the above-entitled
4 matter.)

5
6 C E R T I F I C A T E

7
8 I hereby certify that the foregoing is a transcript of
9 proceedings before the Honorable Martin C. Ashman on May 19,
10 2007.

11 DATED: November 19, 2007

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